In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 838

BERT F. DUESING, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The court of appeals' opinion (Pet. App. 1–9) is reported at 350 F. 2d 748.

JURISDICTION

The judgment below was entered on June 30, 1965 (Pet. App. 10), and a petition for rehearing *en banc* was denied on September 23, 1965 (Pet. App. 10). The petition for a writ of certiorari was filed on December 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior properly exercised authority under the Mineral Leasing Act in

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issuing a regulation closing half of a wildlife reserve to oil and gas leases.

STATEMENT

In August 1957, petitioner filed an application for oil and gas leases on various tracts in the Kenai National Moose Range, which had been established in December 1941 as a wildlife preserve in Alaska by Executive Order No. 8979 (6 Fed. Reg. 6471). Final action on such applications had been suspended since February 1956 because the advisability of leasing such areas for oil and gas production was then under consideration by the Department of the Interior and the House Committee on Merchant Marine and Fisheries (J.A. 40).[1] In October 1957, notice was published in the Federal Register (22 Fed. Reg. 8088) that all or part of the Alaska wildlife areas might be closed to leasing. Public hearings on this matter were held in December 1957 (J.A. 40). On January 10, 1958, the Secretary of the Interior amended 43 C.F.R. 192.9 to provide that "[a]ll pending offers or applications * * * for oil and gas covering * * * Alaska wildlife areas, will continue to be suspended until" approval by the Secretary of an agreement between the Fish and Wildlife Service and the Bureau of Land Management "specifying those lands which shall not be subject to oil and gas leases" (J.A. 17).

On July 24, 1958, the Secretary approved an agreement whereby the southern half of the Kenai National Moose Range was "closed to oil and gas leasing because such activities would be incompatible with

[1] "J.A." refers to the joint appendix in the court of appeals.

management thereof for wildlife purposes" (J.A. 18). The tracts for which petitioner had applied were in the southern half of the range. Petitioner's applications were consequently rejected (J.A. 28–44). Petitioner thereupon instituted these proceedings to review the Secretary's determination (J.A. 2–9). The district court granted summary judgment for the Secretary (J.A. 58), and the court of appeals affirmed.

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with decisions of other courts of appeals or with any decision of this Court. There is, therefore, no need for further review.

1. Petitioner's initial contention is that the Mineral Leasing Act of 1920, as amended, 30 U.S.C. 181 *et seq.*, empowered the Secretary of the Interior to deny mineral leases on an individual tract basis but not to issue a regulation closing a group of tracts to leasing (Pet. 8–9). This construction of the statute is unsound because it denies the Secretary the power to exercise efficiently the discretion conferred upon him by the Act. If the same considerations which the Secretary deems controlling with respect to a single tract—such as, for example, that oil and gas development could be "incompatible with management thereof for wild life purposes" (J.A. 18)—apply to a group of tracts, it is surely permissible for him to issue a general notice to that effect rather than denying applications individually. The language quoted by petitioner from this Court's opinion in *Udall* v. *Tallman*, 380 U.S. 1, is not inconsistent with this view. By recognizing the

Secretary's power to act with respect to a "given tract" (380 U.S. at 4), this Court did not necessarily imply an absence of power to deny applications for a group of tracts.

Nor is there substance to the claim that the range's status was being changed and that this could be done only by a "public land order" (compare 380 U.S. at 9-10). As the court below noted (Pet. App. 5-6), the Secretary was acting here entirely under his discretionary power to deny leases. Hence the procedures prescribed for the exercise of a "withdrawal power" were inappropriate.

2. Petitioner's remaining arguments are unsound. The regulations involved here merely gave applicants notice of the grounds upon which the Secretary would, in the future, deny oil and gas leases in a portion of the Kenai Moose Range. The Secretary has always construed this power as distinct from the power to "withdraw" public lands (see Pet. App. 6), and this consistent and reasonable administrative practice is entitled to great deference. *Udall* v. *Tallman*, 380 U.S. 1, 16-17. In exercising the power to deny leases, the Secretary was not, as petitioner contends (Pet. 17-19), doing what Congress had failed to authorize since he was not withdrawing the land from leasing. And assuming, *arguendo*, that notice and hearing were required before a regulation such as the one involved here was put into effect (Pet. 16-17), interested parties had a full opportunity to present their views in December 1957, when it was clearly stated that all or part of the Alaska wildlife areas might be closed

to leasing (see p. 2, *supra*). Finally, the statements made by a single Senator in 1958 (Pet. 19–22) were properly dismissed by the court below as "no part of the legislative history of the Mineral Leasing Act, passed in 1920 and amended through 1946" (Pet. App. 7). In enacting further legislation in 1960, Congress left the Secretary's authority unchanged despite the objections previously voiced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966